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Supreme Court, U.S.
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No. 95-7452

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995
KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS, SUPERINTENDENT,
TOMOKA CORRECTIONAL INSTITUTION, *et. al,*

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF OF AMICUS CURIAE, NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN
SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether amended Florida penal statute §944.277 (1992) violates the constitutional prohibition against *ex post facto* laws by withdrawing early release credits previously awarded to petitioner under the pre-amendment version of the statute, where that withdrawal was based on petitioner's 1986 offense of conviction.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 9,000 attorneys and affiliate members including representatives from all fifty States. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the House of Delegates. The NACDL was founded in 1958 to advance the quality of the defense of the rights of accused persons, as well as to advocate the preservation of constitutional

rights in this country. Among the NACDL's stated objectives is the promotion of the proper administration of justice. The NACDL seeks when appropriate to be a voice for the rights of the clients of its members. Many of those clients, like petitioner in the case at bar, are indigent, incarcerated and unable to defend themselves against arbitrary and politically popular governmental action which contravenes the Constitution of the United States of America. All parties have consented to the filing of this amicus curiae brief pursuant to Rule 37.3(a) of the Supreme Court Rules.

STATEMENT

The NACDL adopts the statement of the facts and the course of the proceedings below as set forth in the brief on the merits of the petitioner, Kenneth Lynce, emphasizing certain matters set out herein.

As of October 27, 1985, the date of petitioner's crimes (attempted first degree murder and other offenses), the State of Florida had prospectively eliminated parole¹ and had begun to substitute sentencing guidelines and various forms of early release credits which operated to reduce the actual time an inmate would remain incarcerated (see for example, §944.598, Fla. Stat. (1983) regarding "emergency gain time"). During the period of his confinement, petitioner became eligible to earn "administrative gain time" and "provisional release credits" pursuant to the provisions of §944.276, Fla. Stat. (1987) and §944.277, Fla. Stat. (Supp. 1989), respectively. The various types of early release credits were awarded based upon the inmate's adherence to the Department of Corrections' ("the department's") rules and a determination by the State's executive branch that the prison system was nearing or had reached lawful capacity.

¹ §921.001(10)(a), Fla. Stat. (1983) eliminated parole eligibility for persons whose crimes were committed after October 1, 1983.

As a result of prison overcrowding and petitioner's adherence to the department's rules and regulations, the petitioner, per the provisions of §944.276, Fla. Stat. (1987) and §944.277, Fla. Stat. (Supp. 1989), was granted a total of 2,195 days of credits toward early release.² (J.A. 33, 50) On October 1, 1992, he was set free. (J.A. 50)

A 1992 amendment to §944.277, Fla. Stat. eliminated convicted murderers from eligibility to receive provisional release credits. (J.A. 51) At the end of that year, the Florida Attorney General issued 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992) holding that the 1992 amendment should be applied retroactively. As a result, the department canceled all credits previously earned by inmates now deemed covered by the 1992 exclusions, withdrew the 1,860 days of provisional credits³ earlier awarded to petitioner, obtained a warrant for his arrest and caused him to be returned to state prison. (J.A. 51, 52) The retroactive cancellation of petitioner's credits resulted in a new tentative release date ("TRD") of May 19, 1998. (J.A. 52)

SUMMARY OF ARGUMENT

In Florida, state statutes providing for the ability of prisoners to earn administrative gain time and provisional credits are akin to statutes enabling those same prisoners to earn basic and incentive gain time -- at least insofar as the constitutional prohibition against *ex post facto* laws is concerned. The 1992 revision of §944.277, Fla. Stat. which, as applied, caused the Florida Department of Corrections to retroactively cancel provisional credits previously awarded to petitioner and force him back into prison was not lawful. This Court's

² Petitioner's actual release date was also advanced by the accumulation of basic and incentive gain time provided for per the provisions of §§944.275(4)(a) and (b), Fla. Stat., respectively.

³ As a result of new legislation effective June 17, 1993, 335 days of administrative gain time previously awarded to petitioner were also canceled. (J.A. 51.)

decisions in *California Dept. of Corrections v. Morales*, 514 U.S. ____; 181 L. Ed.2d 588 (1995) and *Collins v. Youngblood*, 497 U.S. 37 (1990), do not alter the fact that state laws such as the 1992 amendment to §944.277, Fla. Stat., which retroactively increases the quantum of punishment attached to a sentence, cannot pass constitutional muster simply by being labeled “procedural” mechanisms for administrative prison population control. As this Court stated in *Weaver v. Graham*, 450 U. S. 23, 29 (1981), “[c]ontrary to the reasoning of the Supreme Court of Florida, a law need not impair a ‘vested right’ to violate the *ex post facto* prohibition.” Thus, while provisional credits may not constitute a vested right and while petitioner may have acquired them by virtue of the grace of the Florida legislature, he earned them nevertheless in reliance upon the very laws that same legislature chose to enact.

ARGUMENT

A. Provisional Credits are akin to basic and incentive gain time under Florida law. Florida’s history of retroactively withdrawing the ability to earn same is vindictive and violates the *ex post facto* clause of the United States Constitution.

Article I, section 10, clause 1, United States Constitution, as discussed in depth in *Weaver v. Graham*, 450 U.S. 24 (1981), is a restraint on “State” action. It speaks to substance over form in providing that “(n)o State shall...pass any *ex post facto* Law.” It is not concerned with the *guise* used by the state to alter “the consequences attached to a crime already completed...” but whether the effect of the “law” is “a change (in) the quantum of punishment.” *Weaver v. Graham*, 450 U. S. at 33.

Thus in *Weaver*, this Court stated:

[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*. The critical ques-

tion is whether the law changes the legal consequences of acts completed before its effective date.

450 U.S. at 31. Of equal importance, “[t]he ban (on state *ex post facto* laws) also restricts governmental power by restraining arbitrary and potentially vindictive legislation.” *Id.* at 29. (Citations omitted.)

Unfortunately, the State of Florida, often based upon opinions promulgated by its attorneys general, has a history of first enacting early release statutes for Florida prisoners then arbitrarily attempting to negate the results of its own laws retroactively -- if not with seeming disregard for -- at least notwithstanding the *ex post facto* clause of the United States Constitution. The practical result has been a significant increase in the quantum of punishment to the detriment of thousands of prisoners. The enactment of §944.277(1), Fla. Stat. (1992 Supp.) by the Florida Legislature, and its retroactive application, which resulted in the cancellation of some 1860 days of early release credits previously earned by petitioner, his arrest and return to prison -- is but another chilling example of the State’s disregard for the United States Constitution and that arbitrary history. It should not be countenanced by this Court.

Weaver involved changes in Florida’s basic⁴ gain time statute enacted after the date of the defendant’s crime. This Court made it absolutely clear that, even though gain time was not a “part of the original sentence and, thus, no part of the punishment annexed to the crime at the time petitioner was sentenced” (450 U.S. at 31), basic gain time “substantially alters the consequences attached to a crime completed and therefore changes ‘the quantum of punishment’.” *Id.* at 33

⁴ Basic gain time for petitioner amounted to an automatic 10 days/month or one-third off his total sentence for good behavior. See §944.275((4)(a), Fla. Stat. (1978).

citing *Dobbert v. Florida*, 432 U.S. at 293-94. As such, the Court held that the statute "is a retrospective law which can be constitutionally applied to petitioner only if it is not to his detriment." *Id.* The Court added:

Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its rede-
cessor is a federal question. *Lindsey v. Washington*,
supra, at 400. See *Malloy v. South Carolina*, 237
U.S. at 184; *Rooney v. North Dakota*, 196 U.S., at
325. The inquiry looks to the challenged provision,
and not to the particular individual. *Dobbert v.*
Florida, supra, at 300; *Lindsey v. Washington*, su-
pra, at 401; *Rooney v. North Dakota*, supra, at 325.
Under this inquiry, we conclude § 944.275 (1) is
disadvantageous to petitioner and other similarly
situated prisoners. On its face, the statute reduces
the number of monthly gain-time credits available
to an inmate who abides by prison rules and ade-
quately performs his assigned tasks. By definition,
this reduction in gain-time accumulation lengthens
the period that someone in petitioner's position
must spend in prison. In *Lindsey v. Washington*,
supra, at 401- 402, we reasoned that "[i]t is plainly
to the substantial disadvantage of petitioners to be
deprived of all opportunity to receive a sentence
which would give them freedom from custody and
control prior to the expiration of the 15-year term."
*Here, petitioner is similarly disadvantaged by the
reduced opportunity to shorten his time in prison
simply through good conduct.*

Weaver, 450 at 33-34. (Emphasis added.)

For the same reasons, the retroactive application of
§944.277, Fla. Stat. (1992), like the basic gain time law under
attack in *Weaver*, "constricts the inmate's opportunity to earn
early release, and thereby makes more onerous the punish-

ment for crimes committed before its enactment. This
result runs afoul of the prohibition against *ex post facto* laws."
Weaver, 450 U.S. at 35-36.

In *Lowry v. Parole Commission*, 473 So.2d 1248 (Fla.
1985), the Supreme Court of Florida expedited the disposition
of an inmate's habeas corpus/mandamus petition after the
Florida Parole Commission denied him (and effectively hun-
dreds of other similarly situated prisoners) eligibility for pa-
role as a result of an erroneous attorney general's opinion.
See Op. Att'y Gen. 85-11 (February 13, 1985). This opinion,
which flew in the face of the pertinent parole statutes and
more than 20 years of Commission action, provided that "...a
prisoner serving consecutive sentences is not eligible for pa-
role if he is under a sentence he has not yet begun to serve."
Lowry, 473 So.2d at 1249. After examining the relevant stat-
utes, the court concluded that the attorney general's opinion
"does not represent legislative intent." *Id.* at 1250. *Lowry's*
parole eligibility was reinstated.

In *Waldrup v. Dugger*, 562 So.2d 681 (Fla. 1990), and
Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989), the courts
reviewed Florida's incentive gain time law, §944.275, Fla.
Stat., and specifically the contention that the department's
discretionary authority rendered it immune to legal challenge
when the department decides to curtail incentive gain time.
These cases are relevant since the department advances es-
sentially the same argument in the case at bar by claiming that
administrative gain time and provisional release credits are
simply discretionary "mechanisms for reducing the prison
population for the administrative convenience of the Depart-
ment of Corrections." (J.A. 39.) In *Waldrup* the Supreme
Court of Florida stated:

It is well established that a penal statute violates the
ex post facto clause if, after a crime has been com-
mitted, it increases the penalty attached to that
crime. The United States Supreme Court clearly

established this principle in the early case of *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 963, 67 L.Ed.2d 17 (1981). (Other citations omitted.)

The policy underlying this prohibition is "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Id.*, 450 U.S. at 280-29, 101 S.Ct. at 963-64 (citing *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L. Ed. 2d 344 (1977)). (Other citations omitted.)

A retroactive law, however, is not ex post facto unless two critical elements are present: The law must apply to events occurring before its enactment, and it must disadvantage the offender. (Citations omitted.)

Waldrup, 562 So.2d at 691. In applying the first of the "two critical elements" to incentive gain time, the court said in part:

We have no doubt that both the *incentive* and basic gain-time statutes challenged by *Waldrup* contain the first of these elements.

* * *

Both of these gain-time revisions, then, apply to a large class of inmates like *Waldrup* whose offenses occurred before June 1983, when the act took effect.

Id. (Emphasis added.)

Likewise, in *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), *supra*, the court stated:

The State contends that basic gain time is fundamentally different than incentive gain time because basic gain time is automatically earned by prisoners, while incentive gain time is earned only at the discretion of prison officials. Because incentive gain

time is discretionary in nature, the State contends that petitioner has no right to receive incentive gain time and that the State therefore can alter the method by which incentive gain time is calculated without violating the ex post facto clause of the Constitution.

Id. at 1499. Since Raske did have a right -- a constitutional right -- not to have his ability to earn incentive gain time stripped from him -- the Court found that "*we do not find the State's argument to be persuasive.*" *Id.* (Emphasis added). Finding that its decision was "controlled by the principles announced by the Supreme Court in *Weaver v. Graham*," the Eleventh Circuit recognized that the ability to earn incentive gain time was a privilege granted by the legislature ("the duties that allow a prisoner to earn such gain time are a matter of legislative grace") not the department. *Id.* at 1499. At the time that Raske committed his crime, §944.275(4)(b), Fla. Stat.(1978) was controlling and afforded him the right to incentive gain time. Thus, even though that statute contained the word "may," the Court stated:

We see no fundamental distinction between the conditions that a prisoner must satisfy to receive basic gain time and the conditions that a prisoner must satisfy to earn discretionary gain time. In both cases, the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time.

Raske, 876 F.2d at 1497, 1499. The Court further noted:

We agree, of course, that incentive gain time is discretionary. We note however, that this discretion is not complete. Thus, for example, the State does not contend that a prisoner who has performed his work in an outstanding manner can legally be denied incentive gain time for that work, despite its so-called "discretionary" nature. See *Pettway v. Wainwright*, 450 So.2d 1279 (Fla. 1st DCA 1984).

Id. at 1499, n. 6. The *Raske* court concluded:

Thus even though the opportunity to earn incentive gain time is dependent on the grace of the legislature and the availability of jobs, we conclude that if the State affords its inmates such work, it is bound to reward prisoners for their services at a gain time rate at least equally advantageous to that in effect at the time those prisoners' offenses.

Id. at 1499.

Likewise, the opportunity for petitioner herein to earn provisional credits was dependent on the grace of the Florida Legislature, an overcrowded prison population and his ability to conform to the rules and regulations of the department. Having earned provisional credits pursuant to the statutory scheme the Florida Legislature itself established, that body cannot retroactively strip him of those provisional credits and force him back into prison.⁵

In *Miller v. Florida*, 482 U.S. 423 (1987), the petitioner challenged sentencing guidelines which came into effect after his crime occurred claiming that using the guidelines to determine his sentence constituted an *ex post facto* violation. Application of the new guidelines caused him to fall into a 5 and 1/2 to 7 years presumptive sentence range instead of a 3 and 1/2 to 4 and 1/2 years range. Finding such application to violate the *ex post facto* clause, this Court held:

⁵ Despite the holding in *Raske* regarding incentive gain time, the Florida Attorney General recently issued Op. Att'y Gen. 96-92 (March 20, 1996) to the effect that the department had the right on its own to retroactively terminate the ability of certain inmates (violent and sex offenders) to earn incentive gain time. As a result, the department, on April 21, 1996, adopted Fla. Admin. Code Rule 33-11.0065 (1996) barring those inmates from earning incentive gain time in the future. This rule is the subject of a mandamus petition pending in the Supreme Court of Florida. See *Gwong v. Singletary*, Supreme Court of Florida Case No. 87,824.

A law is retrospective if it "changes the legal consequences of acts completed before its effective date." Weaver, *supra*, at 31, 67 L. Ed. 2d. 17, 101 S.Ct. 960. Application of the revised guidelines law in petitioner's case clearly satisfies this standard.

Miller v. Florida, 482 U.S. at 430. The department then made an argument similar to the one offered by respondents -- that the petitioner was on notice that provisional credits were "contemplated not as a prisoner entitlement but merely as an escape valve which would be triggered only by the need to alleviate overcrowding in the state prison system." (J.A. 45, quoting from *Joseph C. Magnotti v. Harry K. Singletary*, Case No. 93-8554-Civ.- Moreno, USDC-Southern District, decided March 24, 1994.) In rejecting this argument, this Court noted:

Respondent nevertheless contends that the *ex post facto* concern for retrospective laws is *not* violated here because Florida's sentencing statute "*on its face provides for continuous review and recommendation of changes to the guidelines.*" Brief for Respondent 27-28. Relying on our decision in *Dobbert*, respondent argues that it is sufficient that petitioner was given 'fair warning' that he would be sentenced pursuant to the guidelines then in effect on his sentencing date. Brief for Respondent 28.

In our view, *Dobbert* provides scant support for such a pinched construction of the *ex post facto* prohibition.

* * *

The statute in effect at the time petitioner acted did not warn him that Florida prescribed a 5 1/2 to 7 year presumptive sentence for that crime. Petitioner simply was warned of the obvious fact that the sentencing guidelines law -- like any other law -- was subject to revision. The constitutional prohibition

against *ex post facto* laws cannot be avoided merely by adding to a law that it might be changed.

Miller v. Florida, 482 U.S. at 430-31.

B. The inability to earn provisional credits directly increases petitioner's quantum of punishment. The state's retroactive withdrawal of that ability by virtue of the 1992 revision of §944.277, Fla. Stat. based upon the nature of his offense of conviction, violates the *ex post facto* clause of the United States Constitution.

Relying upon *California Dept. of Corrections v. Morales*, *supra*, and *Collins v. Youngblood*, 497 U.S. 37, the department contends that, since provisional credits are simply a "procedural" mechanism to control prison population unrelated to any "substantial personal right" of the petitioner, no *ex post facto* violation occurs when those credits are canceled *after the fact*. (J.A. 39-42.)

Morales involved parole consideration, not gain time or provisional credits toward early release. In *Morales*, the State of California did not eliminate the petitioner's eligibility for parole, nor did it change the date of his initial interview for parole suitability. It merely required him to wait 36 months after his initial interview (instead of one year as the statute in effect at the time *Morales* committed his offense of conviction provided) for a subsequent suitability hearing. *Morales*, 514 U. S. at __; 181 L. Ed. 2d at 593. Nor did the *Morales* court overturn *Weaver v. Graham*, 450 U.S. 24 (1981) and its progeny; instead it clarified that line of decisions. See *Morales*, 514 U.S. at __; 181 L. Ed. 2d at 588.⁶ In *Morales*, this Court, distinguishing the *Weaver v. Graham*

⁶ In footnote 3 of the opinion in *Morales*, however, the Court receded from the language in *Weaver* and other decisions which implied that every retroactive legislative act which might be to the disadvantage of a defendant is necessarily an *ex post facto* violation.

line of cases, held that whether a retrospective legislative act violates the *ex post facto* law constitutional prohibition "must be a matter of degree" (citation omitted), and amendments to laws which create "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes" do not accomplish that evil. *Morales*, 514 U.S. at __; 181 L. Ed. 2d at 597. This Court then determined that no *ex post facto* violation occurred based on the fact that *Morales*, a twice convicted murderer serving at least one 15 years to life sentence, had no possible expectation of being paroled within the 36 months waiting period, his parole eligibility was not was not canceled and the rules regarding his ultimate suitability for parole were not altered.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the jury, having convicted Collins of aggravated sexual abuse, imposed a substantial fine even though no authorization to do so was provided for by law. A later Texas statute authorized the appellate court to reform an improper jury verdict which is what the Texas appeals court proceeded to do. Collins claimed that the Texas verdict reform statute was an *ex post facto* law. *Id.* at 39,40. Finding, in part, that the Texas verdict reform statute was procedural and did not "make more burdensome the punishment for a crime," Collins' habeas petition was denied. *Id.* at 52.

The *Collins* Court warned, however, that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause" and acknowledged that "(s)ubtle *ex post facto* violations are no more permissible than overt ones. *Id.* at 46 (citations omitted). Thus, the question is whether the retroactive law is substantive in that it actually "increase(s) the punishment" or stated slightly differently, "make(s) more burdensome the punishment for a crime." *Id.* at 41, 52.

The 1992 revision of § 944.277(1), Fla. Stat., may be labeled a procedural management tool by the department, but its actual effect upon petitioner was to increase his punishment by causing him to be returned to prison. (J.A. 51.) In addition, it makes more burdensome the punishment for his original crimes by causing him to have to remain confined until May 19, 1998. (J.A. 52) Thus, the subject statute is a violation of the *ex post facto* clause of the United States Constitution.

CONCLUSION

For the reasons set out above, Amicus Curiae, the NACDL, urges this Court to grant the relief sought by petitioner, hold that §944.277, Fla. Stat. (1992), as applied to petitioner and other similarly situated Florida prisoners, violates the *ex post facto* clause of the United States Constitution, issue its writ of habeas corpus, order that petitioner be released from the custody of respondents and grant him such other and further relief as is deemed necessary and appropriate.

Respectfully Submitted,

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